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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 882

JOSEPH B. WHITE AND JAMES PURDHAM, PETITIONERS

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, AND MARYLAND SHIPBUILDING AND DRYDOCK CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The oral opinion of the district court (Pet. App. 5a–8a) is not reported. The opinion of the court of appeals (Pet. App. 1a–4a) is reported at 338 F. 2d 464.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1964. The petition for a writ of certiorari was filed on February 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Deputy Commissioner correctly computed petitioners' "average annual earnings" for purposes of determining the amount of compensation benefits to which they were entitled under the Longshoremen's and Harbor Workers' Compensation Act.

STATUTE INVOLVED

Section 10 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1431, as amended, 62 Stat. 603, 33 U.S.C. 910, provides in relevant part as follows:

> Except as otherwise provided in this Act the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.
>
> (b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hun-

dred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

* * * * *

STATEMENT

Petitioners, who were awarded compensation for employment-connected injuries under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, brought this action to review the Deputy Commissioner's computation of the amount of benefits to which they are entitled. Both petitioners

were employed by the respondent company in the ship repair business (Resp. App. 5).[1] Petitioner White was a chipper and caulker (App. 34, Resp. App. 23); petitioner Purdham was a shipfitter (App. 30). The company's practice is to employ men only as needed on a daily basis. Since the bulk of the company's business is in short-term repair jobs and the number of such jobs which it has at any one time fluctuates widely, the company is able to provide regular employment for a relatively small nucleus of men at the top of the seniority list (Resp. App. 5–10, 12, 18–22, 32, 33). Neither White nor Purdham was near the top of the seniority list for his job classification, and neither man worked regularly for the company in the year preceding his injuries. White worked 63 days in that year and was paid for 74 days; Purdham worked 136 days and was paid for 149 days (the difference in each case being attributable to days of paid vacation) (App. 30, 34). Neither man found other work during that year (Resp. App. 3, 23).

Compensation was awarded to each man for both temporary total disability and permanent partial disability. White, who broke a bone in his left foot, was out of work for nine weeks and two days (Pet. App. 9a, 10a); Purdham, who broke a bone in his left hand, was out of work for eight weeks and two days (Pet. App. 11a, 12a). In addition to receiving compensation for temporary total disability, White was rated

[1] "Resp. App." refers to the Appendix for Appellees in the Court of Appeals. "App." refers to the Appendix for Appellants in the Court of Appeals. "Pet. App." refers to the Appendix to the petition for a writ of certiorari.

with a 17.5 percent permanent disability of his left foot, and Purdham with a 10 percent permanent disability of his left hand (Pet. App. 10a, 12a). Compensation for both temporary total disability and permanent partial disability was computed by the Deputy Commissioner on the basis of the earnings of each petitioner for the year preceding his injury (Pet. App. 9a, 11a, 18a–19a).

The Deputy Commissioner computed petitioners' compensation under Section 10(c) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 910(c), which provides that average annual earnings shall be such sum as shall "reasonably represent the annual earning capacity of the injured employee." That subsection prescribes three factors in accordance with which that figure is to be determined: (1) previous earnings of the injured employee in the employment in which he was engaged when injured, (2) previous earnings of other employees "of the same or most similar class working in the same or most similar employment in the same or neighboring locality," or (3) other employment including self-employment of the injured employee. The Deputy Commissioner used the first of these factors as the basis for his computation and determined "average annual earnings" by looking to each petitioner's actual earnings for the preceding year (Pet. App. 18a).

The district court and the court of appeals sustained the Deputy Commissioner. Relying on two prior decisions in the same circuit,[2] the court of ap-

[2] *Baltimore & O. R.R. Co.* v. *Clark*, 59 F. 2d 595 (C.A. 4); *O'Hearne* v. *Maryland Casualty Co.*, 177 F. 2d 979 (C.A. 4).

peals held that the Deputy Commissioner properly computed "average annual earnings" under Section 10(c) rather than under Section 10(b) because subsection (b) could not "reasonably and fairly" be applied to measure petitioners' average annual earnings since their "employment during the appropriate statutory period was intermittent and irregular in nature" (Pet. App. 3a). The court of appeals also held that it would not disturb the Deputy Commissioner's "expert conclusion that the use of the litigants' actual earnings for the previous twelve-month period was fair and equitable to all concerned, because the seniority system controlled the availability of work for the individual employee, resulting in substantial differentials in earnings" (Pet. App. 3a).

ARGUMENT

The Deputy Commissioner and the courts below correctly applied the Act, and no conflict of decisions has been shown. There is no occasion for further review by this Court.

1. Compensation for disability under the Act is computed on the basis of the employee's "average weekly wages." 33 U.S.C. 908.[3] Average weekly

[3] The injured employee is paid 66⅔% of his average weekly wages for the period of total disability. 33 U.S.C. 908 (a), (b). For permanent partial disability, where the injury is of a type specified in the statutory schedule (as were petitioners' injuries), he receives 66⅔% of his average weekly wages for a specified number of weeks, the number varying according to the part of the body affected and the percentage of disability of that part. 33 U.S.C. 908(c). This award is paid regardless of whether the partial disability actually affects wage-earning capacity. Compare 33 U.S.C. 908(c)(21).

wages are computed under Section 10 of the Act, which provides that they shall be 1/52 of the employee's "average annual earnings." 33 U.S.C. 910 (d). Section 10 provides three alternative methods of computing "average annual earnings." Petitioners' initial contention is that the Deputy Commissioner applied the wrong method of computing average annual earnings.

Subsection (a) of Section 10 applies only where the injured employee shall have worked in his present or a similar employment during "substantially the whole of the year immediately preceding his injury." Petitioners concede that subsection (a) is not applicable.

Subsection (b) provides for cases in which the injured employee shall not have worked in his present or similar employment during substantially the whole of the year preceding the injury. The method provided is to multiply by 260 (if the injured employee is a five-day worker) the average daily wage of an employee "of the same class" who did work for substantially the whole of the preceding year. However, subsection (b), as well as subsection (a), may be displaced by the method set forth in subsection (c) "[i]f either of the * * * methods [provided in the first two subsections] of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied * * *." 33 U.S.C. 910(c). The Deputy Commissioner held, under this language, that the sporadic nature of petitioners' employment during the year preceding their injuries rendered application of subsection (b) unreasonable and unfair (Pet. App. 14a–17a).

Since the statute prescribes that compensation is to be awarded on the basis of "average annual earnings" and not on the basis of expected earnings for the period of disability, the Deputy Commissioner's conclusion was entirely correct even if it were true that petitioners would have had work available during the entire period of their temporary disability. Petitioner White earned $1,793.14 for 74 days of work in the preceding year and petitioner Purdham earned $3,725.27 for 149 days of work during that period (Resp. App. 27, 14). Obviously neither petitioner could be considered as having "average annual earnings" of $6,240—the figure which would result from petitioners' suggested computation under Section 10(b).[4]

Nor is there any merit to petitioner Purdham's claim that the Deputy Commissioner was obliged to consider the likelihood that he would, in the future, move up the seniority scale and thereby obtain more regular employment. Section 10 provides for a calculation of average annual earnings "at the time of the injury" and does not authorize the Deputy Commissioner to allocate weight to future possibilities or probabilities.

As petitioners concede, the holding below—that subsection (b) cannot fairly and reasonably be applied to

[4] Nor are petitioners' claims particularly equitable. The larger portion of the compensation award was not for their temporary total disability but for their permanent partial disability. The latter should, of course, turn not on the work available to petitioners during the several weeks when they were totally disabled (when, they claim, they "would have continued to work" (Pet. 10)), but on available evidence regarding their earnings over a long-term period.

measure average annual earnings where employment is sporadic—is in accord with decisions of three other courts of appeals which have considered the problem. See *Marshall* v. *Andrew F. Mahony Co.*, 56 F. 2d 74 (C.A. 9); *California Ship Service Co.* v. *Pillsbury*, 175 F. 2d 873 (C.A. 9); *Johnson* v. *Britton*, 290 F. 2d 355 (C.A.D.C.), certiorari denied, 368 U.S. 859; *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 805 (C.A. 5).[5]

2. Petitioners also contend that even if the Deputy Commissioner's choice of subsection (c) was proper, his application of that subsection was improper. Subsection (c), where applicable, provides that average annual earnings shall be such sum as shall "reasonably represent the annual earning capacity of the injured employee," having regard to the previous earnings of the injured employee and of "other employees of the same or most similar class." The Deputy Commissioner considered previous earnings of other work-

[5] The holding of the court below and the decisions cited in the text leave room for application of subsection (b) in at least two situations. First, subsection (b) may be applied where the employment is regular but the injured employee was hired less than a year before the injury and so did not work regularly throughout the year preceding the injury. This was the situation in *O'Hearne* v. *Maryland Casualty Co.*, 177 F. 2d 979 (C.A. 4), in which the court held that subsection (b) must be applied. Second, subsection (b) might be applied if the irregularity of the employee's work in the year preceding the injury resulted from an abnormal situation and did not accurately reflect the injured employee's wage earning capacity. There is no showing here that the irregular employment of White and Purdham in the year preceding their injuries was abnormal. Indeed, irregularity of employment for all but the top men on the seniority list was shown to be a chronic condition in the local ship repair yards (Resp. App. 5–9, 18–22).

ers but concluded that previous earnings of men with a different seniority status could not be used to determine petitioners' annual earning capacity, in view of the effect of seniority on earning capacity in this industry (Pet. App. 17a–18a).

Petitioners contend that Congress, by using the word "class" in providing for comparison with the earnings of "other employees of the same or most similar class," intended to refer to the job classifications set forth in the collective bargaining agreement governing petitioners' jobs (Pet. 13–15). Even on this assumption, however, it would surely be necessary for the Deputy Commissioner to consider earnings of other employees only insofar as they occupy the same seniority status as the injured employee. It was as a result of their seniority status and not of their hourly wage that petitioners' "average annual earnings" were below those of other employees in the same job classifications.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

MORTON HOLLANDER,
ROBERT V. ZENER,
Attorneys.

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